

In the matter of)
)
Cox Communications, Inc.)
)
Request for Confidentiality for Information)
Submitted on Forms 325 for the Year 2003)
)

By the Chief, Media Bureau:

I. INTRODUCTION

1. In the captioned matter Cox Communications, Inc., (“Cox”) has filed a Petition for Partial Reconsideration (“Petition”) in which it seeks reversal of a decision¹ not to protect from public disclosure information in various fields of its 2003 FCC Form 325, the Annual Report of Cable of Systems. We grant in part and deny in part the relief that Cox seeks.

II. BACKGROUND

2. Cable television system operators are required to submit a completed Form 325 within 60 days of receiving the form.² The forms are sent annually to all systems that have 20,000 or more subscribers and a sample of systems that have fewer than 20,000 subscribers. Submitted Forms 325 are routinely available to the public in the Commission's Reference Information Center.³ Cable operators, however, may request that the information, or portions of the information, submitted on Form 325 not be made routinely available for public review.⁴ A request for confidentiality must specify the reasons the information should be withheld, pursuant to specific standards set forth in Section 0.459(b) of the rules.⁵ The request must show by a preponderance of the evidence that non-disclosure is consistent with the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.⁶ Should the request be granted, the status of the materials becomes the same as materials not routinely available to the public. Then, a person seeking access to the information must file a request for inspection pursuant to the FOIA procedures.⁷

¹ In the matter of *Cox Communications, Inc.*, 19 FCC Rcd 12160 (2004).

² 47 C.F.R. § 76.403.

³ *Id.* § 0.453(a)(2)(v)(C).

⁴ *Id.* § 0.459.

⁵ *Id.* § 0.459(b)

⁶ *Id.* § 0.459(d)(2).

⁷ *Id.* § 0.459(h). FOIA procedures are in Section 0.461 of the Commission's Rules. *Id.* § 0.461.

3. Cox submitted a Request for Confidentiality (“Request”) with its completed Forms 325 for 2003, identifying the portion of the submitted materials to which its Request applies.⁸ The Request, as subsequently supplemented, sought confidentiality for information provided in the following fields of the form: II.2.b (number of potential subscribers), II.2.c (number of cable modem subscribers), II.2.d (number of telephony subscribers), II.3 (number of leased cable modems and the numbers of leased units of each of the various types of set-top boxes), II.4.b (length of fiber optic plant), and II.4.c (number of fiber optic nodes and average number of subscribers per node). The Request also sought confidential treatment for all of Section III of the form, which is information on frequency and signal distribution. Section III also includes data on capacity and the portion that is activated and contains information on the number of digital channels, their compression ratio, and the modulation method.

4. Cox’s request was granted in part and denied in part. Specifically, the request for confidentiality was denied except for the information regarding the numbers of cable modem subscribers, the numbers of telephony subscribers, the amount of fiber optic cable, and the number of fiber optic nodes and subscribers per node.

III. DISCUSSION

5. In seeking reconsideration, Cox asserts that, in reviewing its Request, the Commission overlooked the policies it stated when adopting the current version of the Form 325 recognizing that the form requests sensitive competitive data. Cox further asserts that these policies should create a presumption against disclosure where the cable operator makes a “reasonable, good-faith argument for maintaining confidentiality of such information.”⁹ Cox also asserts that the Commission has set a policy of balancing the competitive threats posed by disclosure and the public benefit from disclosure, and that the Commission did not identify a public benefit to weigh against disclosure. Indeed Cox asserts that no public benefit exists.¹⁰

6. With respect to the general points raised, Cox’s argument ignores the fundamental FOIA analysis involved. Cox cites in support of a presumption against disclosure the Commission’s *Order on Reconsideration* that disposed of Ameritech’s Petition for Reconsideration in the Form 325 rulemaking proceeding.¹¹ Cox states that we “granted Ameritech’s request that cable operators be permitted ‘to submit [FCC Form 325] data on a confidential basis.’”¹² Cox also states, “The Commission specifically found that ‘cable operators required to file the Form 325 may designate as proprietary such information on the Form 325 that the operator believes, in good faith, to be information that falls within the exception to disclosure contained in the Freedom of Information Act (‘FOIA’).”¹³ Cox, however, ignores the next sentence which invokes the full FOIA review procedures: “Those operators making requests that information contained in their Form 325 submission be withheld from public inspection shall follow the procedures outlined in Section 0.459 of the Commission’s rules.”¹⁴ In the *Order on Reconsideration* not only did the Commission not create a presumption of non-disclosure; it rejected such a request by Ameritech. It invoked the procedures generally available to those submitting in any circumstance information that they believe should be kept confidential.

⁸ *Id.* § 0.459(a).

⁹ *Petition* at 4.

¹⁰ *Id.* at 5.

¹¹ 1998 Biennial Review—“Annual Report of Cable Television Systems,” 15 FCC Rcd 9707 (2000).

¹² *Petition* at 4 (citing the 1998 Biennial Review at 9713).

¹³ *Id.*

¹⁴ 1998 Biennial Review at 9713 (footnote omitted).

7. Similarly, we reject Cox's assertion with respect to the use of a balancing test for non-disclosure. Cox relies on a statement in a staff *Order*, subsequently quoted by the Commission with approval, creating a standard protective order in a tariff proceeding. That *Order* notes that the competitive threat from disclosure may outweigh the public benefit of disclosure. The *Order*, however, is explicitly discussing information that is assumed to be competitively sensitive and the process, through a protective order, whereby parties could obtain access to it.¹⁵ The issue here is whether the information in question is sufficiently competitively sensitive to justify withholding it under the FOIA. The FOIA is a disclosure statute. Under the FOIA those seeking confidential treatment have the burden of demonstrating that they meet the standards for confidential treatment. The public benefit of disclosure is implicit in the statute and the standards of proof are established there. To determine commercial information should be kept confidential, we must determine whether there is evidence that shows that disclosure of the information will cause Cox substantial harm. Where competitive harm is the issue, resolution of the matter in favor of non-disclosure requires a showing that "(1) they actually face competition, and (2) substantial competitive injury would likely result from disclosure."¹⁶ If a party meets this test, then we can find that the threats to competition from disclosure outweigh the public benefit of disclosure.

8. Cox's specific request is that the Bureau reconsider its determination regarding two items, namely: system-specific available and activated upstream capacity and leased cable modems. In the initial *Order* the Bureau noted that the Commission has determined that confidential treatment was warranted with respect to the number of Internet and telephony subscribers and thus granted Cox's request with request to these data fields. On reconsideration, Cox asserts that the same competitively sensitive issues are raised by requiring disclosure of leased modem subscriber numbers and revealing the actually activated upstream bandwidth in preparation for providing data services.¹⁷ Cox asserts that releasing this information on specific systems "telegraphs to competitors where Cox intends to offer services using upstream capacity."¹⁸ Cox makes a persuasive argument that releasing information on leased cable modems effectively makes the total number of subscribers public and that disclosing the amount and activation of upstream capacity for cable modem service discloses competitively sensitive information. With respect to these data fields, we conclude that, on reconsideration, Cox has shown by a preponderance of evidence that it will suffer substantial competitive harm with respect to this information (Field II.3.a and Field III.1.b of Form 325) if it is routinely disclosed.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, pursuant to Section 0.459(d)(2) of the Commission's Rules, 47 C.F.R. § 0.459(d)(2), that the Petition for Reconsideration IS GRANTED to the extent indicated above and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna C. Gregg
Chief, Media Bureau

¹⁵ *Petition* at 5 (citing "*Support Material for Carriers to File to Implement Access Reform Charge Reform Effective January 1, 1998, 12 FCC Rcd 19655 (1997)*")

¹⁶ *National Parks and Conservation Association v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (*National Parks II*).

¹⁷ *Id.*

¹⁸ *Petition* at 7.